Harris Mohd Salleh v The Returning Officer, Ismail bin Haji Majin & Ors and another action (No 2)

HIGH COURT (KOTA KINABALU) — ELECTION PETITIONS NO K5 OF 1999 AND NO K11 OF 1999
RICHARD MALANJUM J
10 JULY 2001

Civil Procedure *— Stay of execution of judgment — Application for — Special circumstances — Earlier application for judicial review dismissed — Stay of execution distinguished from application for judicial review — Issue of jurisdiction, whether applicable in application for stay — Whether court was functus officio to hear application for stay — Whether stay should be granted*

The applicant/second respondent was returned as the winning candidate in the last state general election held in March 1999 for the Likas constituency defeating several candidates including the petitioner. Dissatisfied with the result, the petitioner filed an Election Petition K5 seeking for an order to nullify the result on various grounds. There was another Election Petition K11 of 1999 filed by another defeated candidate. Both these petitions were consolidated and heard together. On 8 June 2001, judgment was delivered for both wherein the respective petitioners were successful and the Likas seat was declared vacant ('the judgment'). For K5, it was the finding of the election judge that the applicant/second respondent had committed corrupt practice as defined in the Election Offences Act 1954 ('the Act'). The applicant/second respondent applied for judicial review but the application was dismissed on the ground that the court had no jurisdiction. Subsequently, the applicant/second respondent applied for a stay of execution of the judgment and all proceedings under and/or pursuant to the certificate and the report issued on 21 June 2001. Counsel for the petitioner raised three preliminary objections on the application, ie on: (i) jurisdiction; (ii) functus officio; and (iii) non appealability. In the course of the hearing, counsel for the petitioner conceded that special circumstances exist in the appeal of the applicant/second respondent. The issues for determination were: (i) whether the court was functus officio in view of the fact that the application for judicial review was dismissed; and (ii) whether the court has jurisdiction and whether the judgment was appealable in view of ss 36 and 37 of the Act. The applicant/second respondent contended that the decision was appealable in view of art 121(1B) of the Constitution.

Held, allowing the application of the applicant/second respondent for stay:

(1) The application of the applicant/second respondent for judicial review was of a different species. The nature and effect of that application were different from the present application. In the former, this court was in effect performing its original jurisdiction

in the sense that it was a matter by itself and not ancillary, interlocutory or arising from an existing cause or matter as in an application for stay. Further, there the relief sought for and if granted would have had the supervisory effect in nature upon the election court. In an application for stay, it is more of an interim preservation of subject matter of an appeal or suspension of execution of a judgment pending an appeal. In fact, a stay order is very much temporary in nature as it would generally expire upon disposal of a pending appeal it relates to. Moreover, in an application for leave in a judicial review matter, one of the paramount considerations is the issue of jurisdiction as it is a principle of law that courts of coordinate jurisdiction cannot supervise each other. That principle is not applicable in a stay application (see p 616E–H).

(2) In an application for stay, it is a settled principle that it is a matter of discretion for the presiding court to exercise based on judicial principles, and it is not a question of jurisdiction. And in order to succeed, it is obligatory upon an applicant to show special circumstances. The court decided to exercise its discretion by granting the stay since, firstly, the main prerequisite of special circumstances was conceded by the petitioner to exist. Secondly, the court found no merit in the objection based on the issue of functus officio. And thirdly, on the issues of jurisdiction and non appealability, the court did not find it appropriate to apply the 'doomed failure' concept because there was an issue to make out of the interpretation of art 121(1B) of the Constitution on the jurisdiction of the Court of Appeal (see pp 617F, 622B–C).

[**Bahasa Malaysia summary**

Pemohon/responden kedua telah dipilih sebagai calon yang menang dalam peringkat terakhir pilihan raya umum yang diasakan dalam bulan Mac 1999 untuk kawasan Likas dengan mengalahkan beberapa orang calon termasuklah pempetisyen. Oleh kerana tidak berpuas hati dengan keputusan tersebut, pempetisyen telah memfailkan Petisyen Pilihan Raya K5 yang memohon satu perintah untuk membatalkan keputusan tersebut berdasarkan beberapa alasan. Terdapat satu lagi Petisyen Pilihan Raya K11 yang telah difailkan oleh seorang lagi calon yang telah dikalahkan. Kedua-dua petisyen telah digabungkan dan didengar bersama. Pada 8 Jun 2001, penghakiman telah diberikan untuk kedua-duanya di mana pempetisyen masing-masing berjaya dan kerusi Likas diisytiharkan kosong ('penghakiman tersebut'). Untuk K5, adalah penemuan hakim pilihan raya bahawa pemohon/responden kedua telah melakukan amalan rasuah seperti mana yang ditafsirkan dalam Akta Kesalahan Pilihan Raya 1954 (Akta tersebut'). Pemohon/responden kedua telah memohon untuk kajian semula kehakiman tetapi permohonan tersebut telah ditolak atas alasan bahawa mahkamah tidak mempunyai bidang kuasa. Berikutan itu,

pemohon/responden kedua memohon untuk satu penggantungan pelaksanaan penghakiman tersebut dan semua prosiding di bawah dan/atau menurut sijil dan laporan yang dikeluarkan pada 21 Jun 2001. Peguam bagi pihak pempetisyen telah menimbulkan tiga bantahan awal tentang permohonan tersebut, iaitu tentang: (i) bidang kuasa; (ii) functus officio; dan (iii) isu pihak tidak boleh membuat rayuan. Semasa perbicaraan dijalankan, peguam bagi pihak pempetisyen bersetuju bahawa keadaan-keadaan khas wujud dalam rayuan pemohon/responden kedua. Persoalan-persoalan yang perlu ditentukan adalah: (i) sama ada mahkamah adalah functus officio memandangkan bahawa permohonan untuk kajian semula telah ditolak; dan (ii) sama ada mahkamah mempunyai bidang kuasa dan sama ada penghakiman tersebut boleh dirayu menurut ss 36 dan 37 Akta tersebut. Pemohon/responden kedua menegaskan bahawa keputusan tersebut boleh dirayu menurut perkara 121(1B) Perlembagaan.

Diputuskan, membenarkan permohonan pemohon/responden kedua untuk penggantungan:

(1) Permohonan pemohon/responden kedua untuk kajian semula kehakiman adalah satu spesies yang berbeza. Sifat dan kesan permohonan tersebut adalah berbeza daripada permohonan sekarang. Dalam permohonan sebelumnya, mahkamah ini melaksanakan bidang kuasa asalnya dalam erti kata ia adalah satu perkara dengan sendirinya dan bukan sampingan, interlokutori atau timbul daripada satu kausa atau perkara yang sedang wujud sebagai mana dalam satu permohonan penggantungan. Tambahan lagi, di sini relif dipohon dan jika diberikan akan mempunyai kesan penyeliaan sifatnya ke atas Mahkamah Pilihan Raya. Dalam satu permohonan penggantungan, ia lebih kepada satu pemeliharaan interim tentang perkara pokok satu rayuan atau penggantungan pelaksanaan satu penghakiman sementara menunggu rayuan. Sebenarnya, satu perintah penggantungan lebih bersifat sementara kerana ia akan luput setelah selesai satu rayuan yang ditunggu yang berkaitan. Tambahan pula, dalam satu permohonan untuk kebenaran dalam satu perkara kajian semula kehakiman, salah satu daripada pertimbangan utama adalah tentang persoalan bidang kuasa kerana ia adalah prinsip undang-undang bahawa mahkamah-mahkamah yang mempunyai bidang kuasa yang setara tidak boleh menyelia antara satu sama lain. Prinsip tersebut tidak terpakai dalan satu permohonan penggantungan (lihat ms 616E–H).

(2) Dalam satu permohonan penggantungan, adalah satu prinsip yang mapan bahawa adalah satu perkara tentang budi bicara untuk mahkamah yang mengendalikan perbicaraan untuk menggunakannya berdasarkan prinsip-prinsip kehakiman, dan ia bukan satu persoalan bidang kuasa. Dan untuk berjaya, adalah wajib untuk pemohon menunjukkan keadaan-keadaan yang khas.

Mahkamah memutuskan untuk menggunakan budi bicaranya dengan membenarkan penggantungkan memandangkan, pertama, syarat utama keadaan-keadaan khas tersebut telah diakui wujud oleh pempetisyen. Kedua, mahkamah tidak menemui apa-apa merit dalam bantahan berdasarkan persoalan tentang functus officio. Dan ketiga, berdasarkan persoalan-persoalan bidang kuasa dan tidak boleh membuat rayuan, mahkamah tidak mendapati ia sesuai untuk menggunakan konsep 'doomed failure' kerana terdapat persoalan tentang tafsiran perkara 121(1B) Perlembagaan berhubung bidang kuasa Mahkamah Rayuan (lihat ms 617F, 622B–C).]

Notes

For cases on stay of execution of judgment, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5460-5498.

Cases referred to

Dason Gaban v Zulkiflee bin Majun & Ors [1982] 1 MLJ 315 (refd)
Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 32 (refd)
Devan Nair v Yong Kuan Teik [1967] 1 MLJ 261 (refd)
Election Commission, Malaysia v Abdul Fatah bin Hj Haron [1987] 2 MLJ 716 (refd)
Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Kerajaan Malaysia v Dato Hj Ghani Gilong [1995] 2 MLJ 119 (refd)
Kerajaan Malaysia v Jasanusa Sdn Bhd [1995] 2 MLJ 105 (refd)
Mohamed Mustafa v Kandasami (No 2) [1979] 2 MLJ 126 (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116 (refd)
Tunku Abdullah v Ali Amberan [1971] 1 MLJ 25 (refd)
Wee Choo Keong v Lee Chong Meng & Anor [1998] 1 MLJ 434 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
Election Offences Act 1954 ss 33(1), 36, 37, 67
Federal Constitution art 121(1B), (2)

Alex Decena (*Lim Pitt Kong* and *John Sikayun* with him) (*Luping & Co*) for the applicant/second respondent.

Ansari Abdullah (*Ansari & Co*) for the petitioner in Election Petition No K5 of 1999.

Raymond Szetu (*Szetu Baldev Gan & Associates*) for the petitioner in Election Petition No K11 of 1999.

Richard Malanjum J: **.** By a notice of motion dated 29 June 2001 ('encl 4') the applicant/second respondent in an Election Petition No K5 of 1999 applied for the following, namely:

(i) for stay of execution or 'however on the whole of the judgment delivered on 8 June 2001' ('the judgment') by Muhammad Kamil J; and/or

(ii) 'all proceedings under and/or pursuant to the certificate and the report both issued on 21 June 2001 in compliance with the provisions of the Election Offences Act 1954 in relation to the Election Petition K5 of 1999'.

I heard the matter on 3 July 2001 and 4 July 2001 and thereafter gave my oral judgment allowing the application. In doing so, I said that I would give my reasons later and if necessary. As there is an appeal lodged I do so now.

Briefly, the applicant/second respondent was returned as the winning candidate in the last State General Election held in March 1999 for the Likas Constituency ('N13') defeating several candidates including the petitioner. Dissatisfied with the result, the petitioner filed an Election Petition seeking for an order to nullify the result on various grounds. There was another Election Petition K11 of 1999 filed by another of the defeated candidate. Both these petitions were consolidated and heard together. On 8 June 2001, judgment was delivered for both wherein the respective petitioners were successful and the Likas seat was declared vacant. However, in nullifying the last election for the Likas constituency different reasons were given for the respective petitions. For K5, it was the finding of the election judge that the applicant/second respondent had committed corrupt practice as defined in the Election Offences Act 1954 ('the Act'). The consequence of that finding as it stands has a disastrous effect on the political life of the applicant/second respondent, one of which is that he is disqualified to stand as a candidate in any election for a seat in the State Assembly and Parliament for a period of five years. Thus, it is apparent that it is not the recontest that is bothering the applicant/second respondent since in the application before me, Election Petition K11 of 1999 and its result were not in issue.

In his affidavit filed in support of his application, the applicant/second respondent stated, inter alia, that in his appeal against the judgment he would be raising a constitutional point in relation to s 36 of the Act. And as regards the judgment the applicant/second respondent said that he would be raising several grounds such as patent errors of law on the face of the record and breaches of natural justice. The special circumstances were also listed and I reproduce them herein in the order as averred in the affidavit in support.

> 12 I am advised and verily believe there exists special circumstances that warrant stay of execution of the judgment, certificate and report (if any) pending hearing and disposal of my applications and appeal. The issuance of the certificate will enable the election writ under s 12 of the Election Offences Act 1954 to be issued by the Election Commission. Under the election writ, dates for nomination and polling will be determined and such dates are likely to be in very soon, in a matter of days. The likelihood of my applications or appeal being heard and

disposed of before the aforesaid dates is remote. Thus, the chances of my standing as a candidate for the coming by-election for the Likas Constituency would be lost if there is no stay of execution. The report (if any), however, has the effect of subjecting me to incapacities.

13 A stay of execution in K5 will not prevent the Election Commission from holding a by-election for the Likas Constituency as the election can still proceed on the basis of the declaration made by the election judge in K11 that the election was null and void.

14 I am advised and verily believe the purpose of a stay pending appeal is not to render an appeal, if successful nugatory. In other words, a successful appeal should not be rendered futile. If no stay is granted and in the event the appeal is successful the appeal would be nugatory to the extent of my lost right to stand for and be elected and further my constitutional right to vote in the by-election.

15 I verily believe there has been a serious miscarriage of justice. If I do not seek and exhaust all legal remedies, the corrupt practices to which I had been found to have committed will now expose me to criminal proceedings under s 11(f) of the Election Offences Act 1954. Further, due to the uncertainties created as a result of the judgment and certificate and possibly the report (if any), I may also be disqualified as a candidate and an elector for a period of five years.

At the outset of the hearing, learned counsel for the petitioner indicated that he had three preliminary objections to make on the application. He listed them as issues on: (i) jurisdiction; (ii) functus officio; and (iii) non appealability. And in the course of the hearing, learned counsel for the petitioner conceded that special circumstances exist in the appeal of the applicant/second respondent. Hence, I would not dwell on this point any longer although it is a crucial test in an application for stay of execution. Ordinarily, such concession would have settled this application but for the preliminary objections raised by learned counsel for the petitioner. Accordingly, the arguments were focused on the points raised as preliminary objections.

In my oral judgment, I said that issues (i) and (iii) could be taken together. I propose to take the same course in this grounds of decision.

On the issue of functus officio, it was the contention of learned counsel for the petitioner that since the application for judicial review was dismissed on the ground of this court having no jurisdiction, the same principle should apply in this application for stay. And it was further contended that upon issuance of a certificate under s 36 of the Act by an election judge that would be final and implied that no stay should be allowed. According to learned counsel, when the petition of his client was allowed by the election court, it implied that an election process had been set in motion beginning with the preparation. And since an election court has the same jurisdiction as a High Court, the latter should therefore be precluded from varying or stopping the consequential effect of the election judge's certificate.

The case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 and *Dato' Seri Anwar bin Ibrahim v PP* [1999] 1 MLJ 321 were also referred to in support of the argument on functus officio.

In response to this issue, learned counsel for the applicant/second respondent submitted that the application for judicial review was completely different in principle from that of the application for stay. According to him, in the application for judicial review, the need to satisfy the court on the point of jurisdiction was essential. Learned counsel also said that the issue of stay was not canvassed. And it was highlighted that in considering an application for stay, the guideline as expounded in the cases of *Kerajaan Malaysia v Jasanusa Sdn Bhd* [1995] 2 MLJ 105 and *Kerajaan Malaysia v Dato Hj Ghani Gilong* [1995] 2 MLJ 119 should be taken into account. That of course is the 'special circumstances' test. The 'nugatory' test as restated in the case of *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 was also pointed out. This last case has also propounded the concept of where a pending appeal is lacking in all merits and is doomed to failure, it would not be a proper exercise of discretion if the practical realities were to be ignored by the court and proceeds to grant stay nevertheless. As for the case of *Hock Hua Bank*, learned counsel said that it should be in his client's favour since in that case, although the then Federal Court did not set aside the original judgment, it was held that a fresh action could be made to impeach it. And in the present situation learned counsel said that his client has taken steps to impeach the judgment. In respect of *Dato' Seri Anwar*'s case, it was submitted that there it was on the interpretation of s 3 of the Courts of Judicature Act 1964 ('the CJA') in relation to the meanings of interlocutory and final orders.

Having considered the respective contentions of the parties, I overruled the preliminary objection on the issue of functus officio. No doubt I heard the application of the applicant/second respondent in connection with the application for judicial review in which I refused leave. But in my view, that application was of different species. The nature and effect of that application were different from the present application. In the former, this court was in effect performing its original jurisdiction in the sense that it was a matter by itself and not ancillary, interlocutory or arising from an existing cause or matter as in an application for stay. Further, there the relief sought for and if granted would have had the supervisory effect in nature upon the election court. In an application for stay, it is more of an interim preservation of subject matter of an appeal or suspension of execution of a judgment pending an appeal. In fact, a stay order is very much temporary in nature as it would generally expire upon disposal of a pending appeal it relates to. Moreover, in an application for leave in a judicial review matter, one of the paramount considerations is the issue of jurisdiction as it is a principle of law that courts of coordinate jurisdiction cannot supervise each other. That principle is not applicable in a stay application.

In respect of the two cases cited, namely, *Hock Hua Bank* and *Dato' Seri Anwar*, I did not find them of much assistance to the argument advanced for the petitioner.

Hence, I found no merit in the preliminary objection based on the issue of functus officio.

A On the issue of jurisdiction and non appealability in relation to the judgment, learned counsel for the petitioner relied on two decisions of the then Federal Court and ss 36 and 37 of the Act. Some provisions in the Federal Constitution ('the Constitution') and the CJA were also mentioned in passing.

B The gist of the contention of learned counsel for the petitioner was that the previous cases, namely, *Tunku Abdullah v Ali Amberan* [1971] 1 MLJ 25 and *Dason Gaban v Zulkiflee bin Majun & Ors* [1982] 1 MLJ 315, held that there was no right of appeal against any decision of an election court. As such, there should be no question of the applicant/second respondent having the right to appeal against the judgment. And it should follow that C the question of stay would not arise. As regards the sections in the Act referred to, it was contended that the finality of the certificate issued by an election judge should imply that there would be no appeal against a decision of an election court. Learned counsel emphasized that an election judge should not be categorized as another High Court judge since the former once nominated would exercise special jurisdiction.

D In reply, learned counsel for the applicant/second respondent submitted that the two cases cited as well as the case of *Devan Nair v Yong Kuan Teik* [1967] 1 MLJ 261 were decided based on s 67 of the CJA and without any argument on the implication of art 121(1B) of the Constitution. And he went on to say that the words 'or a judge thereof' E should be interpreted to include an election court judge in view of s 33(1) of the Act.

It was also contended that in an application for stay, all that was needed was for the applicant/second respondent to show an arguable point and in this case reference was made to art 121(1B) of the Constitution. Learned F counsel submitted that the final determination of the scope and legal implication of that article should be left to the appellate courts to decide.

Now, in an application for stay, it is a settled principle that it is a matter of discretion for the presiding court to exercise based on judicial principles. And in order to succeed, it is obligatory upon an applicant to show special circumstances. In the instant case as indicated above, there was concession G on the part of the learned counsel for the petitioner on the issue of special circumstances. Thus, the applicant/second respondent was relieved of that obligation. Anyway, the following are some of the leading cases that dealt with application for stay.

In *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116, it was laid H down the approach to be adopted when considering an application for stay, that is:

> There is no rule of practice limiting the exercise of his discretion. But it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can *show special circumstances* to justify it. …If, for example, another ground had I been that there were merits in the appeal, that fact coupled with the fact *that the defendant, if successful, could not be restored to his original position might well have afforded special circumstances* to justify the learned district judge

in exercising his discretion to grant a stay; Brown J at p 116. (Emphasis added.)

And in *Mohamed Mustafa v Kandasami (No 2)* [1979] 2 MLJ 126, it was said thus at p 127:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. *One of the determining factors that calls for consideration is whether by not making an order for stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal.* How pertinent that factor would be may vary according to the circumstances of each particular case.
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> In the instant case, it is the considered judgment of this court that the respondent ought to be granted stay of execution to maintain the status quo so as not to deprive him, if successful, the result of his appeal, per Hamid J (as he then was) at p 127. (Emphasis added.)

In yet another case it was said that:

> The law on the granting of an order for stay of execution has been examined a number of times in the courts of this country. It is trite law that the court has an absolute and unfettered discretion to grant or refuse an application for stay. As a rule, the court will however only grant stay if there are *special circumstances and which circumstances must be deposed in the affidavit supporting the application*. The governing principle in all cases where the court is asked to exercise its discretion is clearly expressed by Brown J in *Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116 and the principle is this: the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it. The principle enunciated here goes back to many years ago as can be seen in *Monk v Bartram* [1891] 1 QB 346. In that case, stay had been refused by the trial judge and in the Court of Appeal, it was held that where a stay of execution has been refused by the trial court, an application made in a Court of Appeal for a stay pending appeal must be supported by special circumstances and a*llegations that there has been misdirection or that the verdict or judgment was against the weight of evidence, or that there was no evidence to support the verdict or judgment are not special circumstances*, per Hashim Yeop Sani J (as he then was) in the case of *Syarikat Berpakat v Lim Kai Kok* [1983] 1 MLJ 406 at p 407. (Emphasis added.)

It was also observed by the apex court of this country that existence of mandatory or obligatory statutory provisions would not necessarily bar the exercise of discretion in granting stay of execution (see *Kerajaan Malaysia v Jasanusa*).

Thus, it is a matter of discretion and not a question of jurisdiction. Indeed, even in an application for an interim injunction to restrain the holding of a by-election, the then Supreme Court did not agree that there was no jurisdiction to hear the application involving the exercise of discretion (see *Election Commission, Malaysia v Abdul Fatah bin Hj Haron* [1987] 2 MLJ 716). I would therefore say that it would be incorrect to equate an application for a stay to that of an application for leave in a

judicial review matter in terms of approach. At any rate, I noted that the argument of learned counsel for the petitioner on the issue of jurisdiction was very much related to the point on non-appealability of a judgment of an election court. Accordingly, I turn now to deal with that point.

In *Tunku Abdullah v Ali Amberan* it was said, inter alia, on the issue of non appealability of a judgment of an election court as follows at p 27:

> I am of the opinion that this court has no jurisdiction to entertain this appeal. As to Dato' Nahappan's second and third arguments, the Privy Council has emphatically held in *Devon Nair* [1967] 1 MLJ 261 that a final order (which I consider the order appealed against is) is unappealable. Lord Upjohn explained the historical reason for this as follows at p 262:
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> > 'Constitutionally, decisions on questions of contested elections are vested in the Assembly for which the contested election has been held, but in the course of the nineteenth century many countries, including this country and many of Her Majesty's possessions overseas, adopted the view that, as the deliberations of the Assembly itself were apt to be governed rather by political considerations than the justice of the case, it was right and proper that such questions should be entrusted to the courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by an election tribunal to which those hearings were entrusted was severely limited clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment.'
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> It does not appear that art 118 was brought to the attention of their Lordships in that case. But in the earlier case *Arzu* [1965] 1 WLR 675 their Lordships had to consider the effect of the relevant statutory provisions governing election petitions in British Honduras which are as follows:
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> > 'Local Government (District Boards) Ordinance, c 136: … 12. The Governor in Council may make regulations to provide for the registration of voters and the conduct of elections of members of a board.'
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> Pursuant to such provision there were made: 'Local Government (District Boards) (Registration of Voters and Elections) Regulations, 1963 … 59 A petition complaining of an undue election of any member or members of a board ('an election petition') may be presented to the Supreme Court within ten days after such return or election … 62(1) Every election petition shall be tried by a judge of the Supreme Court sitting alone without a jury, in open court. … (2) At the conclusion of the trial, the judge shall determine whether the member whose election or return is complained of or any other and what person was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor; and upon such certificate being given, such determination shall be final; and the return shall be confirmed or altered or a new election shall be held, as the case may require, in accordance with such certificate. …63 At the trial of an election petition, the procedure shall, as near as circumstances will permit be the same, and the judge shall have the same powers, jurisdiction and authority as if he were trying a civil action without a jury; and witnesses shall be subpoenaed and sworn in the same manner, as near as circumstances will permit, as in the trial of a civil action in the Supreme Court, and shall be subject to the same penalties for perjury'.

Regulation 62(1) of the British Honduras legislation expressly provides that an election petition shall be tried by a judge of the Supreme Court, and yet their Lordships of the Privy Council did not hesitate to give effect to para (2) of reg 62 which provides that the judge should determine the matter referred to him, certify his determination to the government and that upon such certificate being given his determination shall be final.

In my judgment, there is no inconsistency between our Election Offences Act and art 118 of the Constitution, for art 118 does not guarantee the citizen the right of appealing against the decision of a High Court judge, and it is therefore open to Parliament to provide (by law) which decisions of a High Court may be appealed against and which may not. By s 36 of the Election Offences Act, Parliament has clearly provided that the determination of a judge hearing an election petition shall be final. When Parliament enacted s 67 of the Courts of Judicature Act, it knew of the court's reluctance to accept jurisdiction in a case concerning the election of a member of the legislature and that the court will not entertain an appeal such as the one under consideration. If Parliament had intended to change this law, surely it would have written s 67 of the Courts of Judicature Act in such a way as to make it clear beyond doubt that the Federal Court has jurisdiction to hear appeals from the judgment of the High Court not only in any civil matter but also in election petitions. It did not do so and I am convinced that the reason for that is that Parliament did not intend to change the law to render the decisions of an election judge appealable.

As to Dato' Nahappan's first argument, I agree that, as he says, s 36 requires the election judge to determine one of three things, namely:

(i) whether the candidate whose return or election is complained of, or any other and what person, was duly returned; or

(ii) whether the candidate, or any other and what person, was duly elected; or

(iii) whether the election was void.

But I do not agree that it is only that determination that is final, and that findings leading to that determination may be appealed against.

As was pointed out by us during the course of argument, the determination of the learned judge that the election was not void and that the appellant had been duly elected is like the top part of a building and that his findings leading to that determination are like the pillars of the building. We cannot allow the pillars to be attacked, because if the pillars collapse the whole building will collapse also. Besides, the findings complained of were incorporated in the learned judge's determination certified to the Election Commission, they were part of his determination and no such part may be impugned in the Federal Court, per Suffian FJ (as he then was) at p 27.

Again in another case of *Dason Gaban*, it was also his Lordship Suffian LP who said this at p 316:

We dismissed these appeals because there is no inherent right of appeal to us, such a right if any must be granted by statute, and *if there is any right of appeal at all it must be under s 67(1) of the Courts of Judicature Act*. That section provides:

(1) The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law

regulating the terms and conditions upon which such appeals shall be brought.

Be it noted that what that section allows to be appealed from is 'any judgment or order of any High Court'.

Here, however, while it is true that Seah J was a judge of the High Court, he made the order appealed from not in exercise of the ordinary jurisdiction of a High Court judge but of the special jurisdiction of an election judge, having been specially so nominated by the Chief Justice under s 33 of the Election Offences Act.

Some argument, as has been noted, was directed to the provision of sub-s (4) of s 33 of the Act which provides that interlocutory matters in an election petition may be decided by any High Court Judge, yet here again it should be noted that the orders Seah J made were made by him as an election judge, not as a High Court judge.

Our decision was much influenced by the philosophy behind the legislation in England and other Commonwealth countries, on which our own Act is modelled, and that is that constitutionally the validity of an election was decided by the Assembly for which the election was held, that historically it used to be so decided, but in the course of the 19th century many countries adopted the view that, as the deliberations of the Assembly itself were apt to be governed by political considerations rather than by the justice of the case, it was right and proper that such questions should be entrusted to independent and impartial courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by the election tribunal to which those hearings were entrusted was severely limited, clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment. This philosophy may be gleaned from many of the decisions cited to us, and in particular from *Devon Nair* [1967] 1 MLJ 261 p 262.

Section 36 of the Act gives effect to this philosophy by providing that at the conclusion of the trial of an election petition, the election judge must determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and must certify such determination to the authorities set therein; and that 'upon such certificate being given such determination shall be final'.

If such a determination cannot be appealed from because it is essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment, would it not be absurd if a successful candidate whose election is challenged is allowed to delay and protract the petition brought against him by obtaining one interlocutory order after another and then appealing against them all the way to the highest court of the land? (Emphasis added.)

The foregoing decisions of the highest courts of this country would seem to show that the issue is settled, that is, that there is no appeal against a judgment of an election court. Yet the applicant/second respondent has lodged an appeal against the judgment. And it was on that basis that the application for stay was made. And in considering the application, one of the questions I asked myself was whether I should adopt the concept as

propounded in *See Teow Guan*'s case, that is, of 'doomed to failure' and that it would not be a proper exercise of discretion if the 'practical realities' were ignored. I must admit that at first blush that seemed to be a logical approach. However, the inclusion of art 121(1B) of the Constitution in the argument and the clear statement of the Federal Court in the case of *Wee Choo Keong v Lee Chong Meng & Anor* [1998] 1 MLJ 434 persuaded me to ponder. And with the greatest respect to his Lordship Suffian LP, I was of the view that the matter before me should not be simply put aside based on the decided cases. To have done so would have been tantamount to my failure to exercise my discretion the very essence for this type of application. And I decided to exercise my discretion by granting the stay since, firstly the main prerequisite of special circumstances was conceded by the petitioner to exist. Secondly, I found no merit in the objection based on the issue of functus officio. And thirdly, on the issues of jurisdiction and non appealability, I did not find it appropriate to apply the 'doomed failure' concept. And the reason is as follows:

Article 121(1B) of the Constitution reads:

> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry in Kuala Lumpur, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from *decisions of a High Court or a judge thereof* (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law. (Emphasis added.)

Prior to the setting up of the Court of Appeal, there was a similar provision (art 121(2) of the Constitution) governing the then only appellate court in the country, the Federal Court and later renamed as the Supreme Court. But I noted that such provision was not brought to the attention of their Lordships in those cases aforementioned. No doubt there was a clear statement from the court in *Dason Gaban*'s case that '… while it is true that Seah J was a judge of the High Court, he made the order appealed from not in exercise of the ordinary jurisdiction of a High Court judge but of the special jurisdiction of an election judge, having been specially so nominated by the Chief Justice under s 33 of the Election Offences Act 1954.' But that was only dealing with the position of a High Court Judge sitting as an election judge and possibly covered the phrase 'or a judge thereof' in the said article. There is nothing thereof to indicate the position of a High Court vis-a-vis an election court. However, in *Wee Choo Keong*'s case that position seems to have been clarified by the Federal Court with this statement at p 439 thereof:

> We are of the view that the election court is, in fact, the High Court.

If that is the case then there is an issue to make out of the said article referred to by learned counsel for the applicant/second respondent as it speaks of

decisions of High Court as well. Learned counsel for the petitioner submitted that the meaning to be ascribed to that sentence should be confined to the hierarchy of an election court and a High Court. With respect I could not agree. The sentence is clear and unambiguous. And if at all a further clarification is warranted, that should be for the appellate courts to consider. Accordingly, in my view, there appears to be an arguable point to present before the appellate courts to revisit the issue of non-appealability of a judgment of an election court. It follows that the preliminary objections on jurisdiction and non appealability should therefore be overruled and which I did. And in view of this foregoing conclusion, I do not think it is necessary for me to embark on the discussion as to the effect of ss 36 and 37 of the Act. Suffice it to say that it is part and parcel of the argument on the appealability of a judgment of an election court.

As regards the references to some of the provisions in the Constitution and the CJA, I was of the view that their relevance should be subject to the determination of the arguable point. Further, it is not unheard of to grant a stay even if it might suspense the effect of a provision of a statute (see *Kerajaan Malaysia v Jasanusa*).

There was also the contention of learned counsel for the petitioner that any stay given would have an injunctive effect upon the Election Commission in the performance of its constitutional duties. As to this, I would say that, firstly, it was not part of the preliminary objection. Secondly, it was made clear by the applicant/second respondent in this case that he was not contesting the effect of the judgment in K11 of 1999. As such, the consequence arising thereof could proceed. In other words, the Commission could still proceed to hold a by-election and thus fulfilling its obligation. It might have been a different situation if there was No K11 of 1999. It would then be imperative for the applicant/second respondent to have his appeal heard at the earliest time possible. In fact, I was minded to stipulate a time frame for the stay if there was no other case involved. And even the petitioner did not propose any condition should stay be granted. So on the facts of this case, the argument as presented has no merit.

There was another factor that I considered before granting the stay and that is the issue of prejudice upon the parties. Indeed, this could be part of the element of special circumstances. Learned counsel for the petitioner in answer to my question said that if stay was granted, his client would be prejudiced in that his chance of winning the forthcoming by-election would be reduced with the presence of the applicant/second respondent as one of the candidates contesting. I found that to be too speculative. And in fact, there was no affidavit from the petitioner to state his interest to contest in the coming by-election. Other than such a reason, I did not (and do not) think there could be any gain, interest or legitimate expectation due or contingent to the petitioner with the disqualification of the applicant/second respondent.

Whereas for the applicant/second respondent, it would mean that he could not join the contest and would also be disqualified as an elector. Such a situation would arise even before the appellate court could consider his

appeal including the issue of whether he has the right of appeal. The tilt of the scale was therefore obvious.

There were also other points raised by learned counsel for the petitioner which were made in passing such as the need for finality in an election petition. Having considered them as well, I did not find them sufficiently compelling and persuasive as to have induced me to vary my decision to overrule the preliminary objections raised.

Thus, for the foregoing reasons and having considered the application as a whole, I was satisfied that in exercising my discretion I should grant prayers (1) and (2) of the notice of motion herein.

Application of applicant/second respondent for stay allowed.

Reported by Moy Saw Han